No. 10-264

Supreme Court, U.S.
DEC 13 2010
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IN THE

Supreme Court of the United States

MISSOURI,
Petitioner,

v.

CONRAD KRUSE, JR.,
Respondent.

On Petition for a Writ of Certiorari
To the Missouri Court of Appeals, Western District

REPLY BRIEF

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PETITIONER'S REPLY

Nowhere in the brief in opposition does respondent challenge the State's argument that the officers' actions in his case did not, as a matter of law, constitute a "search" under the Fourth Amendment. Nor does he challenge the State's argument that the Missouri court adopted an unwarranted expansion of *Steagald*. Instead, he seeks to dissuade the Court from granting the petition by casting the case as a fact-bound decision of an intermediate court, which is entitled to deference and deserves no further review. Opp.Br. 7, 17, 20. But respondent either misunderstands or intentionally misrepresents the State's arguments and claim of error.

I. The Missouri court's decision involved an interpretation of the Fourth Amendment that was contrary to decisions of this Court and various United States courts of appeals.

In an attempt to suggest that this case does not warrant further review, respondent argues that "The decision below rests upon the specific facts of this case[.]" Opp.Br. 7. Respondent then discusses in detail the various factual conclusions reached by the Missouri Court of Appeals. But in doing so, respondent fails to address the erroneous legal conclusions that drove the Missouri court's analysis.

Certainly the question of whether exigent circumstances exist in any given case is a factual determination. But the Missouri Court of Appeals (and the trial court) discussed the question of exigent circumstances only *after* reaching the erroneous legal conclusion that the officers' actions constituted a

"search" under the Fourth Amendment, which, in the absence of a warrant, would require exigent circumstances as justification. But petitioner is not challenging the Missouri intermediate court's finding that exigent circumstances did not exist; petitioner is challenging the Missouri court's legal conclusion that exigent circumstances were required to justify the officers' conduct in the first instance.

In arguing that the Missouri court properly upheld the trial court's determination that "this specific search [was] unreasonable," Opp.Br. 9, respondent makes the same erroneous assumption made by the Missouri court: namely, that *Steagald* applies not only to the curtilage but also to officer actions not constituting a "search." In this case, the officers were attempting to comply with the dictates of *Steagald* by seeking consent to search the residence for the subject of their arrest warrant because they did not possess a search warrant for the home. Nothing in *Steagald* specifically prohibited the officers' actions of covering the rear exit of the home to prevent flight and promote safety. And even if *Steagald*'s holding covers the curtilage, there is no reason to believe that it covers actions of law enforcement officers that did not constitute a "search" under the Fourth Amendment. Thus, *Steagald*'s requirement that officers have either consent or exigent circumstances in the absence of a warrant to search the home of a person not named in the arrest warrant was simply inapplicable in respondent's case.

Respondent also argues that the trial court's conclusion that the officers were conducting a "search" of respondent's backyard was a "fact-bound determination." Opp.Br. 10. But the question of

whether certain kinds of law enforcement conduct constitute a search or a seizure under the Fourth Amendment is not a "fact-bound determination" precluding the Court's review. If it were, the Court would never have reviewed cases such as *Brendlin v. California*, 551 U.S. 249 (2007) (determining whether a traffic stop subjected a passenger to a Fourth Amendment "seizure"); *Illinois v. Caballes*, 543 U.S. 405 (2005) (determining whether a drug-dog sniff during a lawful traffic stop constituted a "search" under the Fourth Amendment); *Kyllo v. U.S.*, 533 U.S. 27 (2001) (determining whether thermal imaging of a home constituted a "search"); *Arizona v. Hicks*, 480 U.S. 321 (1987) (determining whether an officer's action of lifting a stereo to record the serial number constituted either a search or a seizure under the Fourth Amendment); *U.S. v. Knotts*, 460 U.S. 276 (1983) (determining whether use of a tracking device in a package of drugs constituted a "search"); and *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (determining that actions by a private citizen do not constitute a "search" under the Fourth Amendment). In short, determining whether certain actions constitute a "search" under the Fourth Amendment has been and continues to be a proper question for the Court's determination.

The Missouri court's conclusion that the officers' actions in this case constituted a search was contrary to the Court's precedents, as well as that from United States courts of appeals. In its petition, the State identified several United States courts of appeals decisions with which the Missouri court's decision conflicted. Respondent seeks to distinguish many of those cases on their facts. Opp.Br. 12-17. But in quibbling over factual distinctions, respondent

ignores the relevant legal principle those cases espoused – that law enforcement officers may enter onto curtilage without violating the Fourth Amendment if their purpose in doing so is to further legitimate law enforcement activities unconnected with a search of the property. This was a principle enunciated by the Court in both *Coolidge* and *Horton v. California*, 496 U.S. 128 (1990): no Fourth Amendment violation occurs when a law enforcement officer observes contraband in plain view where he has a "legitimate reason for being present unconnected with a search directed against the accused." *Coolidge*, 403 U.S. at 466.

Respondent also attempts to distinguish several cases on the fact that, in those cases, law enforcement officers first attempted to contact the residents at the front door before venturing into the backyard or elsewhere. Opp.Br. 15-16. While certainly those were the circumstances of many of the cases, the fact remains that law enforcement officers entered onto the curtilage of those residences, but their entries were deemed reasonable and not violations of the Fourth Amendment because their purpose in doing so was to further legitimate law enforcement interests. This legal theory does not fall simply because law enforcement officers in this case simultaneously proceeded to the front and back of the residence. As the State has consistently argued, it was necessary to proceed in this manner to prevent the possible flight of a known violent felon and protect both officer and public safety.[1]

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[1] Respondent argues that the State has not consistently advanced the explanation of officer and public safety, but only advanced the theory that the officers' actions were necessary to prevent the possible escape. Opp.Br. 4. This is incorrect. What

Respondent relies upon a variety of alternatives suggested by the Missouri court that it deemed reasonable, Opp.Br. 10-11, but none of the proffered alternatives would have served the purposes advanced by the actions the officers actually took. The Missouri court urged that, to promote officer safety, the officers "presumably could have strategically positioned other officers in the front yard to provide protection." Pet. App. A14. But this would not have helped if Beel (the known violent felon) fled out the back into the woods under the cover of dark. Although he may not have harmed the officers present in that scenario, he easily could have harmed other members of the public or law enforcement while running free after his escape. The Missouri court also suggested that the officers could have waited until daylight to knock on the door and see if Beel was present, "which would have been both safer and more likely to preclude escape by Beel." Pet. App. A14. But this ignores the fact that this residence was not Beel's home. There was no reason

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respondent refers to is the Missouri court's opinion wherein the court stated, "*In essence*, the State argues that the officers were not conducting a search and, instead, had a separate legitimate reason for being on Kruse's property (namely, to execute an arrest warrant and prevent the potential escape of Beel)." Pet. App. A8 (emphasis added). Looking at the State's actual arguments, the State urged both safety and the prevention of flight at trial, on appeal, and in its transfer application to the Missouri Supreme Court. Pet. App. A31, A44. In the State's appellate brief to the Court of Appeals, the State argued, "Not only were Officers Finnell and Morgan attempting to apprehend a wanted felon, but they were also looking to promote officer safety." (App. Br. 30-31). And, in any event, the prevention of flight of a known violent felon can fairly be said to encompass a desire to promote both public and officer safety.

to believe that Beel would still be present at daylight.[2] Finally, the Missouri court suggested the "the officers could have presented to a magistrate a persuasive request for a warrant to enter on the premises to search for Beel at any time of day or night." Pet. App. A14. But, again, there was nothing suggesting that Beel would have remained on the property while officers sought a warrant. Furthermore, these suggested alternatives were used by the Court of Appeals to refute the existence of exigent circumstances, but exigent circumstances were not required to justify the officers' actions. As the State has consistently argued, no warrant was required for the officers entering the backyard because they were not conducting a "search" under the Fourth Amendment; thus, there was no need to invoke any of the exceptions to the warrant requirement.

II. All of the issues presented in the petition are properly before this Court for review.

In his brief, respondent urges that the State's argument regarding application of the exclusionary rule was not properly presented through the petition. Opp.Br. 19-20, n.3. He also argues that review of this decision would be premature because the Missouri court is an intermediate court in the State of Missouri. Opp.Br. 20. But because the issue of the exclusionary rule is "fairly included" within a

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[2] Both the Missouri court and respondent have noted that Beel's van had a flat tire, and used this fact to imply that Beel was unable to depart the premises. But this notion ignores the fact that more vehicles were present at the residence and that Beel was, by all accounts, perfectly capable of fleeing on foot, which he could easily have done by exiting out the back of the residence into the woods under the cover of dark.

question regarding the reasonableness of law enforcement actions under the Fourth Amendment, and because the Missouri court's decision does represent the current state of the law in Missouri, respondent's arguments are without merit.

First, respondent, citing Supreme Court Rule 14.1(a), argues that "The question presented, which asks only whether the conduct it describes is 'reasonable,' Pet. i, has nothing to do with the applicability of the exclusionary rule." Opp.Br. 20, n.3. Respondent is incorrect.

Supreme Court Rule 14.1(a) provides that "The statement of any question presented is deemed to comprise every subsidiary question fairly included therein." "The exclusionary rule is a remedy necessary to ensure that the Fourth Amendment's prohibitions are observed in fact." *Herring v. U.S.*, 129 S.Ct. 695, 707 (2009) (Ginsburg, J., dissenting). Whether the exclusionary rule is to be applied in any given case depends first upon the determination of whether the Fourth Amendment was violated, and second upon whether the exclusionary rule would serve its purposes under that specific factual scenario. *See id.* at 700. While the State argues that no Fourth Amendment violation occurred in this case, it also argues that even if it did, the officers' conduct was not such that the exclusionary rule should apply. All of the State's arguments relate back to the reasonableness of the officers' conduct. Thus, the State's arguments regarding application of the exclusionary rule can fairly be characterized as a subsidiary question to the issue of whether the officers' actions were reasonable under the Fourth Amendment.

Respondent alternatively argues that "the court below correctly concluded [that this case] involves just the sort of 'deliberate' conduct that 'exclusion can meaningfully deter.'" Opp.Br. 20, n.3 (quoting *Herring*, 129 S.Ct. at 702). But the Missouri court made no such determination. Rather, the Missouri court automatically applied the exclusionary rule without determining whether the law enforcement officers' action rose to a level of culpability such that the deterrent effect of the rule would outweigh the costs to the justice system from its application. Pet. App. A16-A17.

Respondent also argues that review of the issues presented in the petition would be premature because the Missouri court's decision "does not . . . represent the final word in Missouri." Opp.Br. 20. Respondent bases this argument on a series of remote possibilities that may never arise. While it is certainly possible that this issue will present itself again, as the officer conduct in this case is common police practice, there is no reason to believe first, that trial courts will disregard the binding decision of the Missouri Court of Appeals; second, that another district of the Court of Appeals will reach a different result; and third, that if one did, the Missouri Supreme Court would then accept transfer. The Court of Appeals decision in this case represents the law in the State of Missouri on this issue for the foreseeable future. And as the Missouri Supreme Court declined review, the only way for the State to seek further relief is through this Court. Granting certiorari on this petition would by no means be the first intermediate court decision reviewed by the Court. In fact, it was an intermediate court decision, following the denial of discretionary review by the state supreme court, that the Court reviewed in

Illinois v. McArthur, 531 U.S. 326, 329-330 (2001) – a case relied upon by both parties to this petition.

Furthermore, respondent's implication that a decision must represent the "final word" on an issue before it warrants review by this Court is an unattainable standard. Even if the scenario respondent posits were to come to fruition (*i.e.* if another appellate district were to reach a different conclusion and the Missouri Supreme Court were to accept transfer and decide the issue), there is nothing precluding the Missouri Supreme Court from reaching a different conclusion in a later case. The concept of a "final word" fails to account for the nature of our ever-changing legal system. All that is required for a decision to merit the Court's review is that it involve an important federal question decided by a state court in such a way as to conflict with relevant decisions of this Court. Supreme Court Rule 10(c). Here, the Missouri court's decision on a Fourth Amendment issue involving a common police practice is an important federal question, and it was decided in such a way as to conflict with relevant decisions of this Court. Thus, review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 13, 2010